CHUA LIONG HAI & ORS

v.

LIAN SOON INDUSTRIES SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[CIVIL APPEAL NO: R2-12-147-2001]
29 OCTOBER 2001

CIVIL PROCEDURE: *Judgment - Default of defence - Setting aside - Judgment entered by subordinate court - Application to same subordinate court to set aside judgment - Whether procedurally wrong - Whether subordinate court had power to hear application - Right procedure - Whether to appeal against decision - Subordinate Courts Rules 1980 O. 14 r. 5(3), O. 29 r. 14, O. 49 r. 6*

CIVIL PROCEDURE: *Affidavits - Defective affidavit - Absence of proper indorsement - Whether could be used in court - Corrective procedure - Whether to apply for leave to use affidavit - Subordinate Courts Rules 1980 O. 25 rr. 25, 30(2) - Rules of the High Court 1980 O. 41 r. 4*

As the defendants did not comply with the order of the Sessions Court directing them to file the defence, a judgment in default of defence ('the judgment') was entered against them pursuant to O. 14 r. 5(3) Subordinate Courts Rules 1980 ('the SCR'). Thereafter, the defendants applied to the Sessions Court by way of notice to set aside the judgment ('the application'). The plaintiff contested the application and raised two preliminary objections. Firstly, it was argued that the application was wrong in law as the Sessions Court had no power to hear the same. Additionally, it was averred that the affidavit in support of the application was defective and irregular (for not containing the requisite indorsement) and could not therefore be used in court. The defendants filed an additional affidavit ('the corrective affidavit') purportedly to replace the impugned affidavit and rectify the defects alleged. The corrective affidavit notwithstanding, the Sessions Court allowed the preliminary objections and dismissed the application. The defendants appealed and questions hence arose before the learned judge as to: (i) whether the application could properly and lawfully be heard by the Sessions Court; (ii) whether the affidavit in support, or alternatively the corrective affidavit, could be used in court, bearing in mind the purport and effect *inter alia* of O. 25 r. 25 SCR.

Held (dismissing the appeal):

[1] The defendants ought to have appealed to the High Court and not to apply to the Sessions Court to set aside the judgment. The Sessions Court, as a subordinate court, does not have the power under any applicable law, in particular the SCR and the Subordinate Courts Act 1948, to hear such an application less making any order thereon. (p 122 g)

[2] Order 14 SCR does not provide for the setting aside of a judgment in default of defence entered under r. 5(3) thereof. This apart, the phrase "where in these Rules provisions are made" in O. 29 r. 14 SCR shows that a party can only apply to set aside or vary an order or judgment where there are provisions made for the setting aside or varying of an order or judgment. In other words, where there are no such provisions made under the SCR, as in this case, there is no recourse to set aside or vary. The right procedure therefore is to appeal to the High Court against the said decision. (p 124 a-d)

[2a] Order 49 SCR makes no distinction between a judgment and a judgment in default of defence. Hence, a judgment in default of defence is a decision for the purpose of the Order, thereby rendering it capable of being appealed against. Consequently, the defendants ought to have appealed under O. 49 r. 6 SCR against the decision of the learned Sessions Court judge (entering a judgment in default of defence against them). (p 131 a-b)

[3] The affidavit in support does not contain an indorsement as to whose behalf it is filed and as to the dates of swearing and filing. The affidavit is therefore defective and contravenes O. 25 r. 30(2) of the SCR. The affidavit, consequently, cannot be used without the leave of court. (p 129 d-e)

[3a] The defendants should have filed a formal application for leave to use the defective affidavit pursuant to O. 25 r. 25 of the SCR, but have failed to do so. The learned Sessions Court judge was therefore right in disallowing the affidavit in support, or the corrective affidavit. (p 129 e-f)

Case(s) referred to:

Bell & Order Bhd v. Walter Group International Building (M) Sdn Bhd [2001] 6 MLJ 300 ***(refd)***

Evan v. Bartlam [1973] AC HL 473 ***(refd)***

Dato' Wong Gek Meng v. Pathmanathan Myvaganam & Ors [1998] 1 CLJ 625 HC ***(refd)***

Mohamad Nazri Ali v. Abdullah Sidek [2000] 2 CLJ 744 HC ***(refd)***

Retnam Pillai v. Bahagia Trading Agency [1977] 1 MLJ 127 ***(refd)***

Utama Merchant Bank Bhd v. Dato' Mohd Nadzmi Mohd Salleh [2000] 2 CLJ 235 HC ***(refd)***

Yu Oi Yong & Anor v. Ho Thoong Peng & Ors [1977] 1 MLJ 120 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 41 r. 4

Subordinate Courts Rules 1980, O. 14 r. 5(3), O. 25 rr. 25, 30(2), O. 29 r. 14, O. 49 r. 6

For the defendant - Balbir Singh; M/s Wan Balbir & Assocs

For the plaintiff/defendant - KW Yap; M/s KW Yap, Cheng & Partners

Reported by WA Sharif

JUDGMENT

Faiza Tamby Chik J:

The appellant/defendant's appeal is against the decision of the learned judge of the Sessions Court at Kuala Lumpur given on 24 March 2001, which allowed the respondent/plaintiff's preliminary objections and dismissed the defendant's notice of application (encl. 8A) with costs. The chronology of events is as follows:

(1) The plaintiff had claimed against the defendants *vide* letters of demand dated 23 November 1999 and 22 December 1999 and also their solicitor's letters of demand dated 5 January 2000 and 25 January 2000;

(2) The plaintiff had filed summons and statement of claims on 10 August 2000 (pp. 1 - 2 of Appeal Record (AR)) and served the sealed copies to each of the appellants/defendants respectively on 9 September 2000;

(3) On the first mention date on 30 October 2000, Mr. Balbir of M/s. Wan Balbir & Associates had appeared in court representing as solicitors for all the first defendant to the seventh defendant and upon the agreement of both the counsels of the plaintiff and the defendants, the learned Judge of the Sessions Court then fixed a mention date on 4 December 2000 and expressly instructed the defendant's solicitors to file the statement of defence on or before the said mention date;

(4) Thereafter, the plaintiff's solicitors gave a written notice dated 31 October 2000 to the solicitors for the defendant that in the event the statement of defence failed to be filed and served on or before the said mention date on 4 December 2000, the plaintiff shall enter judgment in default of defence against the defendants without further reference. A copy of the said notice dated 31 October 2000 is enclosed and marked as exh. "LTS1" at pp. 82 and 83 of AR;

(5) On the said mention date on 4 December 2000, the defendant through their solicitors had failed to file the statement of defence as ordered by the Sessions Court.

Based on the chronology of court proceedings as abovestated, it is obvious that the judgment in default of defence is a regular judgment as it was entered due to the express non-compliance on the part of the defendant and their solicitors of the order of the court on the mention date on 31 October 2000 that the statement of defence must be filed on or before 4 December 2000. In other words, the defendants and their solicitors had taken for granted the orders and instructions of the learned judge on 31 October 2000 and the reasons tendered by the solicitors for the defendants that the defendants needed to file an application for production of the contract document before filing of defence was rightly not acceptable to the learned Judge of the Sessions court as the said application ought to have been filed before the mention date on 4 December 2000. The defendants and their solicitors had at least one (1) month from the mention date on 31 October 200 till 4 December 2000 or even more than a month if calculated from the date of serving of the summons and statement of claims on 9 September 2000, to file the said application but the defendants and their solicitors had obviously refused, failed and neglected to do so. Further, the filing of the statement of defence does not depend whatsoever on the production of whatever document as all the relevant facts in support of the plaintiff's claims have been clearly stated in the statement of claims. Moreover, it is rather odd as to why the defendants and their solicitors sought to apply for the production of the contract document only after the plaintiff had commenced legal actions against the defendants and not before actions were taken and before legal actions were taken, both the parties through solicitors had exchanged numerous correspondences on the same issue. But not even once was any requests being made by the solicitors for the defendants for copy of the said contract. The defendants and their solicitors had also failed to produce any evidence to the Sessions Court in support of their contention that the deponent had gone overseas to China. I think the

defendants and their solicitors failed to render any reasonable explanation as to why none of all of the seven defendants were available to affirm the said affidavit even if it is true that the particular deponent had gone overseas and also why the said application was not made before the mention date on 4 December 2000 despite having one month to do so. Due to the failure of the defendants and their solicitors to render any reasonable explanations and material proofs for the due consideration of the Sessions Court, the learned sessions court judge had rightly, fairly and duly exercised his discretion in ordering judgment in default of defence against the defendant on 4 December 2000. Nevertheless it is observed that a copy of the said contract had already been forward to the solicitors for the defendants by the plaintiff's solicitors on 11 June 2001 wherein the said contract clearly showed that it binds all the seven defendants as the said contract was entered by the defendants under the name and style of Chua & Sons Trading Company.

Following this, the defendants filed the said application under encl. (8) for setting aside of the judgment in default of defence. The plaintiff had disputed and challenged the said application *vide* the plaintiff's affidavit in reply (pp. 74 - 83 AR). The plaintiff has also duly given notice of preliminary objections to the defendants and their solicitors and has reserved the rights to raise preliminary objections by way of:

(a) Paragraph 5 of the plaintiff's affidavit in reply (p. 75 AR) which reads as follows:

> I have been duly advised by the solicitors for the Plaintiff and verily state that this Plaintiff's Affidavit in Reply is filed without prejudice and without affecting the rights of the Plaintiff to raise any preliminary objections against the Defendant's application and/or the Defendant's Affidavit at the hearing thereof on reasons of irregularity and invalidity.

(b) The letter dated 12 February 2001 from the plaintiff's solicitors to the defendant's solicitors (p 84 AR).

Therefore, it is clear that due notice has been given and the submissions of the solicitors for the defendants and the plaintiff's had waived their rights to raise the said preliminary objections are totally incorrect and devoid of merit and O. 2 r. 1(1) of the Subordinate Courts Rules (SCR) 1980 is inapplicable and misconstrued. It is noted in fact, this issue of waiver of rights to raise preliminary objections was never brought up by the defendant's solicitors at the hearing of the said application on 20 March 2001 before the learned sessions court judge and was only raised for the first time in this appeal.

Pursuant to the said notice of preliminary objections, the plaintiff raised two preliminary objections against the defendant's notice of application and the affidavit in support which are as follows:

(a) That the defendants's application for the setting aside of the judgment in default of defence was wrong in law as the Sessions Court has no power to hear the said application. This is pursuant to a High Court case: *Mohamad Nazri bin Ali v. Abdullah bin Sidek* [2000] 2 CLJ 744, and that the said application ought to be dismissed with costs;

(b) That the defendants's affidavit in support (encl. (8A)) (pp. 33 - 73) is defective and irregular as the said affidavit contained no indorsements (not without jurat as alleged by defendant's solicitors) and for failure to comply with O. 25 r. 30(2) SCR, 1980. Thus, the said affidavit in support ought to be set aside and cannot be used without the leave of court and as such, the said application ought to be dismissed with costs.

It is noted that after hearing the submissions of both counsels, the learned sessions court judge had on 24 June 2000 allowed both the preliminary objections and ordered that the defendants's application at encl. (8) be dismissed with cost on the following grounds:

(a) Pursuant to the said case of Mohamad Nazri, the Sessions Court has no power to hear encl. (8). The defendants did not raised any issues of irregularity of the judgment in its affidavit;

(b) Enclosure (8A) does not contain an indorsement as required under O. 25 r. 30(2) SCR, 1980 and the corrective affidavit (encl. 13) cannot replace the affidavit which had been filed.

The defendants's application (encl. (8)) is for setting aside of the judgment in default of defence dated 4 December 2000. I am of the view that the defendants ought to have appealed to the High Court and not by applying to the Sessions Court to set aside the said judgment in default of defence which was ordered to be entered by the same sessions court judge. This is because the Sessions Court as a Subordinate Court does not have the power under any applicable law, in particular the SCR, 1980 and the Subordinate Courts Act, 1948 to hear such application, less making any order thereon. In the case of *Mohamad Nazri bin Ali v. Abdullah bin Sidek* [2000] 2 CLJ 744, Mohd. Hishamuddin J held as follows:

(1) By reason of O. 29 r. 14 of the Subordinate Court Rules 1980 ('the SCR'), the learned magistrate was right in law in ruling that he did not have the

power to set aside his own judgment given in default of defence, and that the appellant should have appealed to the High Court instead of applying to set aside his judgment. The opening words of O. 29 r. 14 SCR implies that if in respect of a judgment or order made by a subordinate court in respect of a civil matter, there is no provision in the SCR for the setting aside of that order or judgment, as in the present case, then there is no recourse to setting aside the same; the appropriate procedure to be followed by an aggrieved party in such a situation s to appeal to the High Court against that decision.

(2) The magistrate does not have power to set aside by virtue of O. 2 r. 2 SCR as the defendant was not alleging any irregularity in the proceeding and the application was solely on the merits (see p 360E). Similarly, the magistrate does not have the power to set aside by virtue of O. 1 r. 4(1) SCR read with O. 19 r. 9 of the Rules of the High Court 1980 as there is no lacuna in the SCR for, in respect of a decision made under O. 14 r. 5(3) SCR, there is still the avenue to set the decision aside by appealing to the High Court pursuant to O. 49 r. 6 SCR (see pp 360H-361H);

(3) Furthermore, by virtue of s. 99A Subordinate Courts Act 1948 and s 19 of the Third Schedule of the Act, the power to discharge any judgments or orders may be exercised only 'to the event and in the manner provided by rules of court'. As the SCR have prescribed the situations or circumstances where the power of the court to set aside may be exercised and in the light of the implication of O. 29 r. 14 SCR, it follows that the power to set aside may only be exercised by the court in the situations or circumstances so specified, and not otherwise (see p 362C-H). Also, the magistrate does not have the power to set aside by virtue of O. 53 r. 11 SCR as before the magistrate, the defendant was not alleging any abuse of the process of the court on the part of any party and there was no question of preventing any injustice because the defendant had a right to appeal to the High Court (see pp 362E-363F, 363I-364A).

It is to be noted here that the issue is in regard to a judgment in default of defence and not any other type of judgment and in particular not pertaining to a judgment in default of appearance. The rules governing the powers of the Subordinate Courts are particularly found in the Subordinate Courts' Rules, 1980 and the Subordinate Courts Act, 1948. Order 29 r. 14 of the SCR, 1980 provides as follows:

> Where in these rules provisions are made for the setting aside or varying of any order or judgement, a party intending to set aside or to vary such order or judgment must make his application to the Court and serve it on the party who has obtained the judgment within 30 days after the receipt of the order or judgment.

It is important to note the beginning phrase, "Where in these rules provisions are made", which shows that a party can apply to set aside or vary an order or judgment only where there are provisions in the Rules of the Subordinate Court for the setting aside or varying an order or judgment. In other words, where there are no provisions made under the SCR, 1980 for the setting aside (or varying) of an order or judgment, as in this case, then there is no recourse to set aside (or vary) of the same. In this circumstance, I think the right procedure is to appeal to the High Court against the said decision. I think the Judgment in default of defence dated 4 December 2000 was ordered to be entered by the learned sessions court judge pursuant to O. 14 r. 5(3) of the SCR, 1980 which provides as follows:

> (3) If a defendant fails to comply with the order of the Court made under paragraph (2), the Court may make such order as it thinks just including, in particular, an order that judgment be entered for the plaintiff.

It is pertinent to note that O. 14 of the SCR, 1980 does not have any provisions for the setting aside (or varying) of a judgment in default of defence entered by virtue of the said O. 14 r. 5(3). It is also significant to note that the defendants have not raised any issues of irregularity in its affidavit in support. The said affidavit in support (pp. 33 - 73 AR) was solely based on merits. Therefore, the defendants's solicitors' submission on the issue of irregularity is inadmissible as the same is not based on evidence from the affidavit in support filed by the defendants. It is also trite law that submission on evidence from a solicitor (evidence from the BAR) is inadmissible in a court of law, without the support of any affidavit evidence in an application based on affidavit evidence. It is also trite law that parties are bound by affidavit evidence made by it. The defendants's solicitors action in raising issues not deposed in affidavit prejudiced the plaintiff.

I am of the view that O. 1 r. 4(1) SCR, 1980 is inapplicable in this circumstance where to adopt the Rules of the High Court, 1980, in particular O. 19 rr. 2 and 9 of the RHC, 1980 for the setting aside of a judgment in default of defence. There is no lacuna in the SCR, 1980 even though there aren't any provisions for the setting aside of a judgment in default of defence under SCR, 1980. The defendants can still appeal to the High Court against the decision of the Sessions Court in entering the said judgment, under O. 49 r. 6 of the SCR, 1980. In the case of *Mohamad Nazri* the court held as follows:

> With respect, in my opinion, merely because the SCR does not contain any provision for the setting aside by the magistrate's court of its judgment given in default of defence, it cannot be said that there is a lacuna in the SCR. To my

mind, it is axiomatic that the absence of a corresponding provision in the SCR *vis-a-vis* the provision in the RHC cannot be a sufficient basis for determining whether or not there is a lacuna in the SCR. As I see it, there is no lacuna at all in the SCR. For, in respect of a decision made under O. 14 r. 5(3) of the SCR, there is still avenue to have the decision set aside: the aggrieved party can appeal to the High Court. Section 49 r. 6 of the SCR provides:

Appeal to judge in chambers

(1) Notwithstanding anything contained in this order, an appeal shall lie to a judge in chambers from any decision made by the court other than a decision made after trial.

...

To my mind the learned author in he above passage of Janab's Key to Civil Procedure in Malaysia and Singapore 1995 second edn. is not prescribing any principle pertaining to setting aside of judgments or orders in default of defence by the subordinate courts but is merely stating his observations to what 'appears' to be the practice of the subordinate courts. With respect, I am not sure whether I can concur with the views of the learned author regarding the practice of the subordinate courts pertaining to setting aside and the application of O. 1 r. 4(1). However, assuming that such a practice indeed do exist and that it is based on O. 1 r. 4 of the SCR read with O. 19 r. 9 of the RHC then such a practice is based on misconception of the law and must cease forthwith. If the practice is contrary to O.29 r. 14 - and I hold that it is contrary to O. 29 r. 14 - then such a practice is wrong in law, no matter how widespread the practice is.

...

Second, learned counsel referred to s. 99A of the Subordinate Courts Act 1948 and s. 19 of the Third Schedule of the Act. Section 99A states:

In amplification and not in derogation of the powers conferred by this Act or inherent in any court, and without prejudice to the generality of any such powers, every session court and magistrate's court shall have the further powers and jurisdiction set out in the Third Schedule.

Section 19 of the Third Schedule reads:

Discharge of orders

Power to discharge, vary or suspend the operation of any of its judgments or orders to the extent and in the manner provided by rules of court.

Now, it is true that the above s. 19 of the Third Schedule gives subordinate court the power to 'discharge' any of its judgments or orders. And according to Jowitt's Dictionary of English Law (p. 620):

> To discharge the order of a court or judge is to set it aside, on an application made for the purpose, either to the court in which the order was made, or to a court of appeal.

At the same time, however, it is significant to note that the power is restrictive in the sense that it may be exercised only 'to the extent and in the manner provided by rules of court'. The words 'rules of court' in s. 19 mean any rules of court made under the Subordinate Courts Rules Act 1955. The SCR are such rules. As the SCR have prescribed the situations or circumstances in which the power to set aside may be exercised (eg. O. 2 r. 2, O. 24 r. 8, O. 25 r. 7, O. 28 r. 8, and O. 5 4 r. 10), and in the light of the power to set aside may only be exercised by the court in the situations or circumstances so specified, and not otherwise.

The court disagrees with the suggestion that the Subordinate Court has the inherent power to set aside a judgment in default of defence pursuant to O. 53 r. 11 of the SCR, 1980 and stated as follows:

> Third, it was agreed by En Sebastian that the magistrate has the power to set aside the judgment in default of defence by virtue of the court's.
>
> Inherent power as so declared by O. 53 r. 11 of the SCR. This provision reads:
>
> > Inherent powers
> >
> > For the removal of doubt it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.
>
> While on the one hand, I concede that the court has wide inherent powers under this rule, including, in appropriate and deserving cases, the power to set aside its own judgments or orders, it is also my view that the court must tread with caution in invoking the powers under this provision, otherwise this provision itself might be abused. Since there are already provisions elsewhere in the SCR for the setting aside of judgments or orders, it should only be in rare and exceptional cases that the court sets aside a judgment or order in the exercise of its inherent powers. Even then, under this provision it must be appreciated that there is a limitation to the exercise of the inherent powers; the exercise of such powers is limited only to situations where it is 'necessary to prevent injustice or to prevent an abuse of the process of the court'. It is imperative for the court to bear in mind that the circumstances of the case must be such that it is clearly necessary for the court to exercise its inherent powers. The burden of satisfying the court on the necessity of exercising its inherent powers to prevent injustice or an abuse of the process of the court lies on the party seeking the court to invoke its powers. If we appreciate this limitation, then in the context of the present case, the irresistible conclusion is that O. 53 r. 11 is irrelevant. My reasons are these. First, before the learned magistrate the appellant/defendant was not alleging any abuse of the process of the court on the part of any party. Hence

the question of abuse of process of court does not arise. Second, before the learned magistrate there was no question of preventing any injustice because the appellant/defendant had a right to appeal to the High Court against the previous decision of the magistrate.

Finally, in support of his arguments, Encik Sebastian referred to the following cases:

(1) *Hamzah Atan v. Perbadanan Johor* [1995] 5 CLJ 183;

(2) *Tan Lee Siang & Ors. v. Kenneison Brothers Sdn. Bhd.* [1999] 5 MLJ 716;

(3) *Kewangan Bersatu Bhd. v. Yap Aah Yit & Ors.* [1999] 1 CLJ 429; and

(4) *Shaharuddin bin Abdul Rahman v. Satisah Ismail Sdn. Bhd.* [1982] 2 MLJ 79.

With respect, I find none of the above cases cited relevant, for they can be distinguished from the present case. None of the above cases concern a judgment in default of defence made under O. 14 r. 5(3) of the SCR; and none of the cases discuss O. 29 r. 14 of the SCR. In conclusion, I hold that by reason of O. 29 r. 14 of the SCR the learned magistrate was right in law in ruling that he did not have the power to set aside his own judgment given in default of defence under O. 14 r. 5(3) of the SCR, and that the appellant should have appealed to the High Court instead of applying to the magistrate to set aside his judgment.

Appeal dismissed with costs.

The defendants's request that this court do exercise its inherent power to set aside the judgment in default of defence amounts to a request that the said power be exercised without any limitation and in whatsoever circumstances despite that fact that the said judgment was entered due to the blatant disobedient and negligent of the defendants and their solicitors against the court's directions and order. I think the application of Mohamad Nazri does not in anyway produce injustice as suggested by the solicitors for the defendants since the defendants still have the right to appeal against the decision to enter the said judgement in default of defence. In the circumstances of this case, it is even move obvious that O. 53 should not be invoked in favour of the defendants who had blatantly disobeyed the order and direction of the court to file the statement of defence and taken for granted the said order and direction.

The said affidavit (encl. (8A)) does not contain an indorsement as to:

(a) on whose behalf it is filed;

(b) the date of swearing; and

(c) the date of filing.

Hence, the said Affidavit is defective and irregular due to the defendants's failure to comply with O. 25 r. 30(2) of the SCR 1980 which provides as follows:

> Every affidavit must be indorsed with a note showing on whose behalf it is filed and the dates of swearing and filing, and an affidavit which is not so indorsed may not be filed or used without the leave of the Court.

It is clear that the defendants's Affidavit which had failed to comply with the said O. 25 r. 30(2) may not be used without the leave of court. In the case of *Mohd. Nazir bin Badar Shair v. Timbalan Menteri Dalam Negeri* [2000] 2 MLJ 559 Augustine Paul J (as he then was) held:

> However the indorsements on all three affidavits were defective as the indorsements did not state the dates of swearing and filing of the affidavits. The respondents also failed to apply for leave to use the affidavits and the court was thus compelled to order that the affidavits could not be used (see p 566G-H, 567A).
>
> ...
>
> This indorsement is defective as it does not state the dates of swearing and filing of the affidavits. However, as provided by the rule referred to the affidavits, even though defective, may be used with leave of court. But no application has been made by the respondents for leave to use the affidavits. That compels me to order that the affidavits cannot be used.
>
> Furthermore, the indorsement to the affidavit is defective as it does not show the dates of swearing and filing it. No application was made for leave of court to use the affidavit. Again the affidavit cannot thus be used. The motion is therefore left without any affidavit to support it.
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> In the opshot I dismiss the motion.

In the case of *Utama Merchant Bank Bhd. v. Dato' Mohd. Nadzmi Mohd. Salleh* [2000] 2 CLJ 235, Judicial Commissioner Ramly Ali (as he then was) held:

> (4) Apart from the above, the affidavit did not contain any endorsement relating to the dates of swearing and filing of them contrary to O. 41 r. 9(2) RHC. Further, the plaintiff failed to apply for leave of court to use them as required by the said rule.
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> ...
>
> (6) The circular issued by the Chief Registrar of the Federal Court dated 22 May 1999 also emphasized strict complaince with O. 41 RHC.

(7) The circumstances showed that the plaintiff had sufficient time to file a formal application for leave of court to allow the use of the defective affidavits under O. 41 r. 4 RHC. But the plaintiff chose not to do anything until the SAR gave his decision. The court was of the view that the plaintiff's failure to make a formal application for leave under O. 41 r. 4 RHC was not because of no opportunity or insufficient time but because of the plaintiff's own stand that it had complied with O. 41 r. 1(7) and (8) of RHC and hence no question of making any application for leave, oral or otherwise would arise.

...

(9) The plaintiff misconstrued O. 41 r. 4 RHC as giving it a carte blanche cover to overlook all forms of irregularities, without appreciating the fact that O. 41 r. 4 gives the discretion to the court to allow or disallow a party to use a defective affidavit. Hence, the plaintiff's entitlement was subject to the court's discretion and unless the discretion was wrongly exercised, the decision of the SAR should not be disturbed.

It is pertinent to note that the Defendants did not deny the aforesaid irregularity of the Affidavit in Support. In fact, upon knowing the said defect, the Defendants had attempted to rectify the said defect by filing a Corrective Affidavit (pp. 85 - 87 AR). Based on O. 25 r. 25 SCR, 1980 which is pari material with O. 41 r. 4 RHC, 1980 and the abovestated authorities, the defendant should have filed a formal application for leave to use the said defective affidavit but the defendants had failed to do so. Order 25 r. 25 SCR, 1980 provides as follows:

An affidavit may, with the leave of the court, be filed or used in evidence notwithstanding any irregularity in the form thereof.

The defendants had also failed to comply with O. 25 r. 25 SCR, 1980 and the corrective affidavit cannot be replaced or correct the Affidavit in Support which has been filed in this circumstance. Thus, the learned sessions court judge was right in deciding in accordance to the relevant authorities. The defendants have had ample time to make an application for leave but has chosen not to do so even at the hearing of the said notice of application. The defendants were insistent on its stand that the corrective affidavit was sufficient. The defendants's stand that a formal application for leave is unnecessary is clearly misconceived in law and inconsistent with the rules of the court and the abovestated authorities. In addition, the issue of prejudice was never raised by the defendants at the hearing of the said notice of application.

I am of the opinion that based on the chronology of events leading to the judgement in default of defence and the invalidity of the defendants's notice of application and the defective affidavit in support, it is clear that there are non-compliance with the order, direction and the rules of the court as well as the authorities of cases on the part of the defendants and their solicitors. In the case of *Yu Oi Yong & Anor. v. Ho Thoong Peng & Ors.* [1977] 1 MLJ 120 the court held:

> (1) There should be some adherence to the rules of court, unless required by circumstances, if there is to be any meaning or purpose in such rules;
>
> (2) It should be realised by practitioners as well as by judges that while strict and slavish adherence to forms and rules can sometimes hinder the administration of justice, these forms and rules should not be disregarded for no reason whatsoever, since they embody the experience of the courts over the years in the cause of speedy and efficient administration of justice.

In *Dato' Wong Gek Meng v. Pathmanathan a/l Myvaganam & Ors.* [1998] 1 CLJ 625, the High Court held as follows:

> Strict and dutiful adherence to forms and rules especially to the RHC will, in the long run, ensure an efficient bar and with it, a speedy and efficient administration of justice. Objections to technicalities must be viewed *prima facie* as non-compliance with the rules and the defaulters must pay dearly for it. It is obsolete now to adopt the old fashioned attitude that the rules of the RHC are intended to facilitate and not impede the administration of justice. On the contrary, the administration would be curtailed if the rules embodied in the RHC are not religiously followed. Lawyers cannot afford to adopt a lackadaisical attitude nor can they wring their hands and say that the courts would show mercy to them. As a code of procedure, the RHC should be strictly followed to the letter. Therefore, encls. 46 and 49 - which were not in compliance with Form 114 of the RHC - were struck out with costs. In view of the dismissal of encl. 49 - which meant that the writ of summons and the statement of claim had been struck off - encl. 21 had become academic and was also struck off (see pp. 566F-1 and 567A-F); *Kuah Kok Kim v. Chong Lee Leong Seng Co. (Pte.) Ltd.* [1991] SLR 122, *Leal v. Dunlop Bio-Processes* [1984] 1 WLR 874 and *Ong & Co. Pte. Ltd. v. Carl YL Chow* [1987] 2 MLJ 430 followed.

As to whether the definition of the word "decision" under O. 49 of SCR, 1980 pertaining to appeal from the Subordinate Court to the High Court includes "judgment" namely a judgment in default of defence. I am of the opinion that O. 49 r. 1 of SCR, 1980 clearly provides as follows:

> In this Order "decision" includes "judgment", "order" and "decree".

Order 49 makes no distinction between a judgment and a judgment in default of defence nor any exception to the same. A judgment in default of defence is therefore a decision for the purpose of the said O. 49. Hence it is undeniable that a judgment in default of defence is a decision capable of being appealed against Order 49 SCR, 1980.

The defendants ought to have appealed under O. 49 r. 6 SCR, 1980 against the decision of the learned sessions court judge in making an order to enter judgment in default in defence against the defendants. Order 49 r. 6 SCR, 1980 provides as follows:

> Notwithstanding anything contained in this Order, an appeal from any decision other than a decision made after a trial by the Court shall lie to a Judge in Chambers of the High Court.

First, it is undisputed that the said judgment in default of defence is ordered under O. 14 r. 5(3) SCR, 1980 which provides as follows:

> (3) If a defendant fails to comply with the order of the Court made under paragraph (2), the Court may make such order as it thinks just including, in particular, an order that judgment be entered for the plaintiff.

In this circumstance, Mohd Hishamuddin J has rightly held as follows at pp. 361 and 362 in the case of *Mohamad Nazri bin Ali v. Abdullah bin Sidek*:

> For, in respect of a decision made under O. 14 r. 5(3) of the SCR, there is still avenue to have the decision set aside: the aggrieved party can appeal to the High Court. Section 49 r. 6 of the SCR provides:
>
> Appeal to judge in chambers
>
> (1) Notwithstanding anything contained in this order, an appeal shall lie to a judge in chambers from any decision made by the court other than a decision made after trial. The appeal must be considered an interlocutory appeal and must be made under 5.6 above because the decision to give the judgment in default of defence clearly was not a decision made after a trial.

Thus, it is clear that even though the sessions court judge had ordered judgment in default of defence against the defendants, the defendants can still have the avenue to set aside the said judgment by making an appeal to the High Court pursuant to O. 49 r. 6 SCR, 1980. Therefore it cannot be said that it was unfair to the Defendants as it was the defendants that had elected not to make an appeal to the High Court against the said decision but instead was adamant in making an application to the Sessions Court to set aside the said judgment

with the knowledge that the Sessions Court has no power to hear such an application as there was no provision of law for the same.

As to whether the non-compliance of the defendants of the order of the Sessions Court to file the defence ought to be excused, reference is made to the chronology of proceedings filed herein by the plaintiff. In the case of *Bell & Order Bhd. v. Walter Group International Building (M) Sdn. Bhd.* [2001] 6 MLJ 300, the court held as follows:

> (1) Clearly, the defendant had brought about this dilemma upon itself through its own wilful conduct in ignoring the procedural requirements. Even when the second notice to enter judgment was served on the defendant's solicitors on 14 October 1999, the defendant chose to ignore this warning. Even at this stage, it failed to apply to the court of first instance for a stay pending appeal. The defendant allowed for the judgment to be taken and then filed an application to set aside.
>
> (2) The defendant had been caught in an inextricable quagmire created by its own conduct in failing to take the various steps that were provided by the Rules of the High Court 1980. It had thus brought about its own downfall. There was an order of the court to file the defence within three weeks. That order had not been set aside. The prayer sought in encl. 27 therefore could not stand. The defendant's attempt to justify why it chose to ignore the order of the court to file the defence was unacceptable, as the defendant, apart form merely stating that it did so to protect its right to arbitration, actually took no positive step to secure the same.
>
> (3) The blatant disregard of an order of court, either through ignorance of the law or through wilful desire to do so, must result in the court refusing to exercise its discretion in favour of the defaulter. Orders of court must be obeyed unless a timeous application is made to stay that order.

In the same circumstance, in the instant appeal the defendants, apart from merely stating that it was unable to file the defence because of a need to obtain a document and unable to affirm the affidavit in support of an application to produce document, actually took no positive step to secure the same. The defendants had ignored the procedural requirements and disregarded an order of the court to file the defence on 4 December 2000 which had resulted on its own the said judgment in default of defence being ordered against them. Therefore, the defendants are without reasonable or acceptable excuse as to why the order of the court was not obeyed and as to why no positive steps were taken by the defendants to stay the said order.

I think the case of *Evan v. Bartlam* [1973] AC HL 473 is inapplicable for the following reasons:

(i) What was stated by the House of Lords were merely dictum and not *ratio decidendi*;

(ii) That the said English case is not binding on this court;

(iii) That the said case is distinguishable as it did not touch on the rules of the court as in our very own Subordinate Court Rules 1980, that binds and governs the civil practices and procedures which ought to be followed in the Subordinate Courts.

The case of *Retnam Pillai v. Bahagia Trading Agency* [1977] 1 MLJ 127 was also referred to in the case of Mohamad Nazri wherein the court held as follows:

> Anyway the learned magistrate in dismissing the application by the appellant to set aside his own judgment contended that the judgment was entered inter partes hence he had no power to set it aside and the appellant's remedy was to appeal against the judgment.
>
> Mr. Periasamy counsel for the appellant argued that the learned magistrate had the powers to set aside his own judgment if such judgment was obtained by default of defence. He also argued that there was no provision in the Subordinate Courts Rules for setting aside judgments in default of defence and where the defendant was present at the time of the judgment although the Rules, as he contended, expressly provided the procedure for setting aside judgment in cases of default of appearance. Counsel therefore submitted that being the case the Rules of the Supreme Court be adopted (Order 1 r. 2 of the Subordinate Courts Rules).
>
> Now, before we go further, we have to examine whether the Subordinate Court Rules do not have any procedure for setting aside any judgment in default of defence and where the defendant was present at the time of judgement. Obviously under the Rules there is no such procedure. And this leads to another question whether it is the intention of the legislature not to allow setting aside inter partes judgment by the same subordinate court and that the procedure intended to be is by way of appeal.
>
> On examining the Rules closely I am of the opinion that it is the intention of the legislature that in cases of inter partes judgment the setting aside of the said judgment should be by way of appeal. My reason for saying so is that the rules expressly provide the procedure for setting aside by the magistrate under Order 19 rule 3(3) in cases of default of appearance but no such provision is made

under the following rule 4 in cases of undefended actions. My view is that this omission is not inadvertence and the intention is that the defendant should set aside the judgment by way of appeal. My view is further fortified after examining Order 36 rule 14 which sets out the procedure where a defendant is precluded from defending an action. Rule 14(b) and (d) reads as follows:

> If in any action it is ordered that a defendant be precluded from defending:
>
> (a) ...
>
> (b) he should be permitted to attend the trial of the action, but not to take part therein;
>
> (c) ...
>
> (d) for the purpose of any appeal or further proceedings the judgment shall be deemed to have been given *inter partes.*

In the instant appeal the following facts were not denied expressedly nor by clear implication:

(a) That the order of court on 31 October 2000 that the defendants do file their defence on 4 December 2000 was disobeyed;

(b) That the said judgment in default of defence was ordered *inter partes* in the presence of both the defendants and the plaintiff or the respective solicitors;

(c) That there is clearly no provision under the SCR, 1980 for an application to set aside a judgment in default of defence.

Therefore, the defendants were wrong in law in applying to the Sessions Court to set aside the order of 4 December 2000. The defendants should have appealed against the said order. In the circumstances of the present case, the law does not provide for setting aside. It is clear that the present appeal of the defendants cannot be maintained or allowed. For these reasons the defendants' appeal dated 5 April 2001 is hereby dismissed with costs.